IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.774 OF 2006

M/s. Nikumbh Dairy Products Ltd.
A Company incorporated under the
Companies Act, 1956 having its
Registered office at D-8, Gokul Sirgaon,
MIDC, Kolhapur, Maharashtra.
....Applicant.

Vs.

1. The State of Maharashtra.

2. Mr. Hemang A. Jariwala,
91, Pushpak Apartments,
31,Altamount Road,
Mumbai 400 026.

....Respondents.

Mr. V.V.Pai i/by M/s. Mayur & Jariwala for the Applicant.

Mrs. Bina H. Jariwala for the Respondent No.2.

Mr.P.S.Hingorani,APP. for the State.

CORAM : R.S. MOHITE,J.
DATED : 22/3/2006.

ORAL JUDGMENT :

1. Heard both sides.

2. Rule. By consent, rule made returnable forthwith.

3. By this application, the applicant impugns an order passed by the Metropolitan Magistrate 23rd Court at Esplanade, Mumbai in C.C.No.550/S/2002 condoning

delay in filing of the complaint. The application further seeks to quash and set aside an order dated 14.2.2006 passed by the Sessions Court in Criminal Revision Application No.123/2006 whereby the said revision has been dismissed by the Additional Sessions Judge.

4. The brief facts of the case are as under:

. The complainant had filed a criminal complaint against the present applicant and other accused alleging offence under Section 138 of the Negotiable Instruments Act. The process was issued on 23.7.1997. In 2005, the present applicant and one of the other accused had filed Criminal Application No.899 of 2005 for quashing of complaint and the order issuing process. The ground taken in the said application was that the complaint has been filed beyond the period of limitation permitted by Negotiable Instruments Act. I am informed that the said complaint was withdrawn on 10.2.2005. On 29.11.2005, the respondent No.2 filed an application for condonation of delay. The Metropolitan Magistrate vide impugned order dated 20.1.2006 allowed the application for condonation of delay. This order has been confirmed by the revisional court by order dated 14.2.2006 whereby the revision filed by the

present applicant has been rejected.

5. In the aforesaid facts, it is clear that the application for condonation of delay was filed after eight years after issuance of the process and when cognizance of the complaint had already been taken. The fact that the cognizance was taken is evident from the fact that the process has been issued by the Magistrate in the year 1997. Section 142(a) read with sub-section (b) bars the court from taking cognizance unless the complaint is made within one month from the date of which the cause of action has arisen under clause (c) of Section 138 of the Negotiable Instruments Act. Proviso to Section 142(b), bars the court from taking cognizance by way of an exception carved out, if the complainant satisfies the court that he has sufficient cause for not making a complaint within such period.

6. Taking of cognizance of the case is the duty of the court and before cognizance is taken, it is the responsibility of the Magistrate to satisfy himself that the complaint has been filed within the prescribed period of limitation. It is well settled that cognizance is taken when the court applies its mind in order to find out if any offence is made out. This

would also include a duty to determine if the complaint is filed within time. Cognizance must not be taken where there is a delay unless the delay is explained by sufficient and acceptable cause. In the present case, unfortunately the process has been issued notwithstanding the fact that there was some delay in filing of the complaint.

7. It appears that the present applicant and one other accused agitated this point by filing an application before the High Court and such application was filed in the year 2005 i.e. 8-years after the process was issued. This application was withdrawn. But, the net result of making such an application was that the complainant woke up to the fact that there was delay in the filing of his complaint and applied for condonation of delay.

8. In the case of **Sou. Surekha S. Hajare Vs. Instacomp reported in 2004 ALL MR (Cri.) 373,** this Court has held that the application for condonation of delay, can either be filed with the complaint or can also be moved at any later stage. In my view, after process has already been issued if such an application had been made by the complainant, the court ought to have decided the said application alongwith all other

issues at the stage of disposal of the trial.

9. The trial under Section 138 proceeds under Chapter XX of the Cri.P.C., the prescribed procedure does not permit the Magistrate to decide the matter piecemeal and all relevant issues are required to be decided at one and the same time i.e. when the trial is decided. In Para 16 of the judgment in the case of **Subramanium Sethuraman Vs. State of Maharashtra and anr. reported in JT. 2004 (8)S.C. 220** the Apex Court observed as under:

> "16. The next challenge of the learned counsel for the appellant made to the finding of the High Court that once a plea is recorded in a summons case it is not open to the accused person to seek a discharge cannot also be accepted. The case involving a summons case is covered by Chapter XX of the Code which does not contemplate a stage of discharge like Section 239 which provides for a discharge in a warrant case . Therefore, in our opinion the High Court was correct in coming to the conclusion once the plea of the accused is recorded under Section 252 of the Code the procedure contemplated under Chapter XX has to be followed which is to take

the trial to its logical conclusion".(emphasis provided).

10. In the present case, unfortunately the trial court did not take the trial to its logical conclusion and decided the complainant's application, pending the trial even though there was no provision in law to decide the question of limitation as a preliminary issue. Such orders passed pending the trial encourage unnecessary litigation by way of appeal and revision and the parties are required to suffer grave hardship which is totally avoidable.

11. On the merits of the impugned judgment, the delay has been condoned relying upon the judgment of this court in the case of **Mr. R.K.Chawla and anr. Vs. M/s. Goa Antibioties & Pharmaceuticals Ltd and anr. reported in 2005 ALL MR (Cri.) 2789.** The said case has been carried to the Apex Court. I have been shown the order of the Apex Court where notice has been issued to the other side and the trial has been stayed. I am informed that the matter is under consideration before the Apex Court.

12. Be that as it may, having held that there is no intermediatary stage in the trial for deciding any

preliminary issue, I must set aside both the impugned judgment and orders which I accordingly do. Having set aside the impugned judgments and orders, I direct that the application filed by the respondent No.2 for condonation of delay and the contentions made in the said application as well as the contentions in this regard which may be made by the accused will be considered by the trial court while deciding the case at the final stage of the trial and will be dealt with in his judgment. The decision will be taken in accordance with law which will prevail at that stage. It is made clear that though the impugned orders have been quashed, the application for condonation of delay made by the respondent No.2 will still be treated as pending and part of the record. It is further made clear that making of an application at a later stage is clearly tenable in view of the judgment of this court in the case of Surekha Hajare (cited supra). Much time has been wasted in the matter being carried in revision and thereafter to this court and therefore, it is expected that the trial court will decide the matter expeditiously and in any case before the end of the year. Rule is made absolute in the aforesaid terms.

(R. S. MOHITE, J.)

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Mr. P.S.Hingorani,APP. for the State.

CORAM : R.S. MOHITE, J.
DATED : 22.3.2006.

ORAL JUDGMENT:

1. For the reasons recorded separately in the oral judgment, this court passed the following order.

. Be that as it may, having held that there is no intermediatary stage in the trial for deciding any preliminary issue, I must set aside both the impugned judgment and order which I accordingly do. Having set aside the impugned judgments and orders, I direct that the application filed by the respondent No.2 for condonation of delay and the contentions made in the said application as well as the contentions in this regard which may be made by the accused will be considered by the trial court while deciding the case at the final stage of the trial and will be dealt with in his judgment. The decision will be taken in

accordance with law which will prevail at that stage. It is made clear that though the impugned orders have been quashed, the application for condonation of delay made by the respondent No.2 will still be treated as pending and part of the record. It is further made clear that making of an application at a later stage is clearly tenable in view of the judgment of this court in the case of Surekha Hajare (cited supra). Much time has been wasted in the matter being carried in revision and thereafter to this court and therefore, it is expected that the trial court will decide the matter expeditiously and in any case before the end of the year. Rule is made absolute in the aforesaid terms.

(R.S. MOHITE, J.)